In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 967

SAM UMANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 28–38) is reported at 368 F. 2d 725.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1966. A petition for rehearing was denied on November 15, 1966. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to January 14, 1967, and on January 12, 1967, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

246-839—67

QUESTIONS PRESENTED

1. Whether the indictment should have been dismissed on the ground that it had been returned on the basis of hearsay evidence.

2. Whether it was error to refuse to make available to the defense under 18 U.S.C. 3500 statements by government witnesses in which they admitted taking bribes from persons other than petitioner.

3. Whether petitioner was properly convicted of aiding and abetting Internal Revenue agents' receiving of fees prohibited by 26 U.S.C. 7214(a)(2).

4. Whether petitioner's convictions under 18 U.S.C. 201(b) and (f) involve mutually inconsistent crimes and must therefore be reversed.

STATUTES INVOLVED

The relevant statutes are set forth in the Appendix, *infra*, pp. 9–10.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York on twenty-four counts charging the aiding and abetting of Internal Revenue agents to receive illegal fees, and the giving of money to Internal Revenue agents. Counts 1 through 8, embracing nine separate transactions prior to January 20, 1963, charged petitioner with aiding and abetting the participating Internal Revenue agents in receiving illegal fees in violation of 26 U.S.C. 7214(a)(2). For these same transactions, petitioner was also charged (counts 16 through 24) with giving money to the agents in order to influence their

official acts in violation of 18 U.S.C. 201 (1958 ed.) (in effect through January 20, 1963). Counts 10 through 12 charged violations of 18 U.S.C. 201(f), and counts 25 through 27 charged violations of 18 U.S.C. 201(b), based on three transactions subsequent to January 20, 1963 (A. 6a-11a).[1] The government's evidence (the sufficiency of which is not challenged here) consisted primarily of the testimony of the Internal Revenue agents[2] that they each accepted fees from petitioner ranging from $25 to $100 in connection with audits of the tax returns of petitioner's clients. On October 10, 1965, petitioner was sentenced to imprisonment for two years on each count, the terms to run concurrently. On appeal, the court of appeals reversed the convictions on the three counts under 18 U.S.C. 201(f) on the ground that they were lesser included offenses of 18 U.S.C. 201(b), but in all other respects affirmed the convictions.

ARGUMENT

1. Petitioner attacks the indictment, which was based upon the testimony of an Internal Revenue agent who summarized for the grand jury the contents of various affidavits of the witnesses who later testified at petitioner's trial (Pet. 6). The court of appeals, although cautioning against excessive use of hearsay in the presentation of a case to the grand jury, refused, on the authority of *Costello* v. *United States*, 350 U.S. 359, to reverse the conviction on that

[1] "A." refers to petitioner's appendix in the court below.

[2] The agents were indicted with petitioner, but prior to trial they had pleaded guilty.

ground (Pet. App. 36-37). This Court recently declined to reconsider the *Costello* decision in *United States v. Payton*, No. 624 Misc., certiorari denied, December 12, 1966, and there is no more reason to do so here. As in *Payton*, this was not a situation where the government could be said to have used a relatively uninformed agent to present its case to the grand jury either because the case was weak, or because the best witness would have made a poor showing. The strong evidence of guilt adduced at trial shows that there could not have been any such devious purpose. The government made clear to the grand jury that it intended to rely upon testimony by former revenue agents that they had been offered by and taken money from petitioner in connection with the audit of his clients' accounts. In view of the number of affidavits[1] to such effect, the grand jury could well have concluded that there was no reason for them to hear each affiant individually before determining that the charges should be aired at a trial.

2. At the conclusion of the direct examination of each of the government's witnesses, petitioner requested statements pursuant to 18 U.S.C. 3500. Statements which related to the direct examination of each witness were made available to petitioner; other statements were, after an *in camera* inspection by the trial court, ordered sealed, because they related to payments received by the various government witnesses from persons other than petitioner (Pet. App. 37).

[1] We note that those affidavits were made available to the defense at trial.

Petitioner argues (Pet. 16-17) that even though those statements did not relate to the direct testimony of the witnesses, they should have been turned over because they might have been helpful to the defense for use in impeaching the witnesses by showing prior acts of misconduct involving moral turpitude. However, as the court below pointed out (Pet. App. 37), petitioner would not have been permitted to cross-examine the witnesses as to details of other instances of bribery for which the witnesses had not been indicted, see *United States v. Irwin*, 354 F. 2d 192 (C.A. 2), certiorari denied, 383 U.S. 967, and so no valid purpose would have been served by allowing him to examine those statements that implicated others in criminal offenses. Petitioner was permitted to ask whether the witnesses had accepted bribes from other persons (see A. 74a, 105a), and he received an affirmative answer to that question. That impeaching answer was all that petitioner was due; he was not entitled to the statements containing details of transactions with others which were irrelevant to the issues at this trial.

3. Petitioner attacks his conviction on the counts charging violations of 26 U.S.C. 7214(a)(2) and 26 U.S.C. 201 (b) and (f). Since petitioner received concurrent sentences on each count, and his challenge does not extend to counts 16 through 24 (violations of 18 U.S.C. 201 (1958 ed.)), these issues need not be considered. *Hirabayashi v. United States*, 320 U.S. 81, 85; *Lawn v. United States*, 355 U.S. 339. They are, in any event, without merit.

a. Petitioner argues that he could not be convicted as an aider and abettor of the Internal Revenue agents who received money from him because concert of action between payor and receiver is a necessary element of the offense. He relies upon cases holding that one person cannot be charged with a conspiracy, an offense which by definition involves concert of action (Pet. 18). However, 26 U.S.C. 7214(a)(2) prescribes only receipt by an Internal Revenue agent, of fee or compensation, except as by law prescribed, and therefore concert of action is not necessarily an element of the offense. Under these circumstances, petitioner, who was found to have made prohibited payments to the agents, was properly convicted as an aider and abettor. *United States* v. *Kenner*, 354 F. 2d 780 (C.A. 2), certiorari denied, 383 U.S. 958; *May* v. *United States*, 375 F. 2d 994 (C.A.D.C.), certiorari denied, 389 U.S. 850; see also *United States* v. *Johnson*, 337 F. 2d 180 (C.A. 4), certiorari denied *sub nom. Ellis* v. *United States*, 385 U.S. 846.

b. The crimes defined by 18 U.S.C. 201 (b) and (f) are not mutually inconsistent. Section 201(f) (counts 10 through 12) proscribes the giving of money to any public official "because of any official act performed or to be performed" by such official. It requires no proof of intent to influence official action.[1]

[1] Petitioner misreads Section 201(f). In his view (Pet. 20–21), that section proscribes a payment made for the "proper discharge" (Pet. 20) of an official act. However, the quoted phrase, when placed in context, is part of a clause—"otherwise than as provided by law for the proper discharge of official duty"—which clearly was designed only to exclude from the section's coverage whatever payments might be made to an official in the normal course of his duties, *e.g.*, his salary.

On the other hand, Section 201(b) (counts 25 through 27) proscribes the act of *corruptly* giving money to a public official with *intent to influence action*. A finding by the jury that petitioner gave money to the various agents in violation of 18 U.S.C. 201(f) would not preclude the further finding that the money was given corruptly with intent to influence their official action in violation of 18 U.S.C. 201(b). The court below properly held the crime defined by section 201(f) to be a lesser included offense of the crime defined by section 201 (b), and it reversed petitioner's conviction under the former.[5]

CONCLUSION

For the reasons stated above, it is respectively submitted that the petition for a writ of certiorari should be denied.

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[5] In light of petitioner's convictions on the other counts, no conjecture (Pet. 22) as to the facts found by the jury was involved in the court's reversal of the conviction under §201(f), after it had decided that the section defined a lesser-included offense. Moreover, the sentences imposed for violations of §201(b) and §201(f) were the same, and were concurrent, as we have noted, with the convictions on counts 16-24.